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6 **UNITED STATES DISTRICT COURT**
7 **DISTRICT OF NEVADA**
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9 ERIBERTO LEON,

10 Petitioner,

11 vs.

12 GREGORY SMITH, *et al.*,

13 Respondents.
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) 3:09-cv-00416-RCJ-VPC
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ORDER

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16 I. Introduction

17 This action is a petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254 by
18 Eriberto Leon, a prisoner at the High Desert State Prison, in southern Nevada.

19 Petitioner was convicted, following a joint jury trial, in Nevada's Eighth Judicial
20 District, in Clark County, Nevada, on October 16, 2003, of conspiracy to commit burglary, two
21 counts of burglary while possessing a firearm, conspiracy to commit kidnaping, first degree
22 kidnaping with the use of a deadly weapon, first degree kidnaping with the use of a deadly weapon
23 resulting in substantial bodily harm and conspiracy to commit murder. Exhibit 2.¹ Petitioner was
24 sentenced to imprisonment for life with the possibility of parole after thirty years for the first degree
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¹ The Exhibits referred to in this Order, unless otherwise identified are located in the record at ECF No. 13.

1 kidnapping with the use of a deadly weapon resulting in substantial bodily harm and the sentences for
2 the other convictions were set to run concurrently to that sentence. Exhibit 3.

3 Petitioner appealed Exhibit 4. The Nevada Supreme Court affirmed his conviction on
4 May 17, 2005, holding that claims that he was denied a fair trial because he was trial with his co-
5 defendant and because the State exercised preemptive challenges to two minority jurors were without
6 merit. Exhibit 5.

7 On June 9, 2004, while the appeal was still pending, petitioner filed a state post-
8 conviction habeas petition raising three grounds for relief. Exhibit 6. He complained he had not
9 been offered any plea negotiations; that the dismissal of two minority jurors had been improper and
10 he had received ineffective assistance of counsel where counsel did not investigate petitioner's
11 competency to stand trial. This petition was denied by the state district court on January 18, 2005.
12 Exhibit 7. Petitioner did not appeal.

13 On June 14, 2006, petitioner filed a federal petition for writ of habeas corpus in case
14 number 2:06-cv-00703-JCM-RJJ. Exhibit 9 to Petitioner's Opposition to the Motion to Dismiss
15 (Petitioner's Exhibit). That action was dismissed without prejudice on November 3, 2006, because
16 his state post-conviction review was still ongoing and the federal petition contained grounds for
17 relief that had not been exhausted in state court. Petitioner's Exhibit 10.

18 While the first federal petition was still pending, on August 14, 2006, petitioner filed
19 a pro se motion to correct an illegal sentence which challenged the enhanced penalty for the
20 conspiracy to commit robbery with the use of a deadly weapon conviction. Exhibit 8. On the state's
21 agreement, an amended judgment of conviction was entered on September 21, 2006, which removed
22 the enhanced penalty for that count. Exhibit 9.

23 Next, on August 28, 2006, petitioner filed a second petition for writ of habeas corpus,
24 post-conviction in the state court. Exhibit 10. He raised five grounds for relief including (1) a claim
25 that the petition was not procedurally barred because the state court lacked jurisdiction to entertain
26 his first petition; (2) that he received ineffective assistance of counsel in failing to move for a

1 severance of his trial from that of his co-defendant, (3) because counsel failed to file a motion to
2 dismiss the first degree kidnaping with the use of a deadly weapon charge, (4) because counsel failed
3 to object to jury instruction number 10, and (5) because counsel failed to call character witnesses at
4 sentencing in order to place petitioner in a favorable light before the court. Counsel was appointed
5 to represent petitioner and she filed a supplemental petition raising an additional two grounds.
6 Exhibit 11. Those supplemental claims included allegations of ineffective assistance of counsel in
7 failing to sever petitioner from his co-defendant and ineffective assistance of appellate counsel in
8 failing to challenge petitioner's conviction on various of the charges.

9 On the state's motion to dismiss the petition as time-barred and successive, the court
10 conducted a hearing and determined that the petition was, in fact, untimely and successive. Exhibit
11 13. The petition was denied on those bases. *Id.* The Nevada Supreme Court affirmed the denial on
12 the procedural grounds identified and found that petition had failed to demonstrate cause to
13 overcome the procedural bar or prejudice. Exhibit 15. Remittitur issued on January 12, 2009.
14 Exhibit 16.

15 II. The Current Federal Petition

16 On July 18, 2009, petitioner submitted a *pro se* federal habeas corpus petition to this
17 Court, initiating this action. *See* Petition (ECF No. 1). The issues of the filing fee was resolved and
18 the petition was filed on February 25, 2010 (ECF No. 7). Petitioner raises a total of eight grounds
19 for relief including all those presented in the second and supplemental state post-conviction petitions
20 and one suggesting that this Court should dismiss the first degree kidnaping charge on the basis that
21 it violates equal protection.

22 Respondents' motion to dismiss argues three alternative defenses: procedural default,
23 lack of exhaustion as to ground six, and timeliness. Petitioner opposes dismissal attempting to show
24 cause to overcome the default and arguing that the petition was timely, or if it was not, the delay was
25 due to the actions or inactions of the state court. The arguments are discussed below.

1 III. Procedural Default

2 A. General Principles

3 Respondents argue that petitioner has procedurally defaulted his federal claims in
4 state court.

5 “Procedural default” refers to the situation where a petitioner in fact presented a claim
6 to the state courts but the state courts disposed of the claim on procedural grounds, instead of on the
7 merits. A federal court will not review a claim for habeas corpus relief if the decision of the state
8 court regarding that claim rested on a state law ground that is independent of the federal question and
9 adequate to support the judgment. *Coleman v. Thompson*, 501 U.S. 722, 730-31 (1991).

10 The *Coleman* Court stated the effect of a procedural default, as follows:

11 In all cases in which a state prisoner has defaulted his federal claims in
12 state court pursuant to an independent and adequate state procedural
13 rule, federal habeas review of the claims is barred unless the prisoner
14 can demonstrate cause for the default and actual prejudice as a result of
 the alleged violation of federal law, or demonstrate that failure to
 consider the claims will result in a fundamental miscarriage of justice.

15 *Coleman*, 501 U.S. at 750; *see also Murray v. Carrier*, 477 U.S. 478, 485 (1986).

16 To demonstrate cause for a procedural default, the petitioner must be able to “show
17 that some objective factor external to the defense impeded” his efforts to comply with the state
18 procedural rule. *Murray*, 477 U.S. at 488. For cause to exist, the external impediment must have
19 prevented the petitioner from raising the claim. *See McCleskey v. Zant*, 499 U.S. 467, 497 (1991).

20 Ineffective assistance of counsel may satisfy the cause requirement to overcome a
21 procedural default. *Murray*, 477 U.S. at 488. However, for ineffective assistance of counsel to
22 satisfy the cause requirement, the independent claim of ineffective assistance of counsel, itself, must
23 first be exhausted in state court. *Murray*, 477 U.S. at 488-89. In addition, the independent
24 ineffective assistance of counsel claim cannot serve as cause if that claim is procedurally defaulted.
25 *Edwards v. Carpenter*, 529 U.S. 446, 453 (2000).

26 With respect to the prejudice prong of cause and prejudice, the petitioner bears:

the burden of showing not merely that the errors [complained of] constituted a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire [proceeding] with errors of constitutional dimension.

White v. Lewis, 874 F.2d 599, 603 (9th Cir. 1989), citing *United States v. Frady*, 456 U.S. 152, 170 (1982). If the petitioner fails to show cause, the court need not consider whether the petitioner suffered actual prejudice. *Engle v. Isaac*, 456 U.S. 107, 134 n.43 (1982); *Roberts v. Arave*, 847 F.2d 528, 530 n.3 (9th Cir. 1988).

B. There Was a Procedural Default in State Court.

In this case, there was a procedural default in state court. On the appeal from the denial of petitioner's state-court habeas petition, the Nevada Supreme Court ruled:

Appellant filed his petition more than one year after this court issued the remittitur from his direct appeal. Thus, appellant's petition was untimely filed. [fn3: *See* NRS 34.276(1).] Moreover, to the extent that appellant's petition raised claims of ineffective assistance of trial counsel, the petition was successive and constituted an abuse of the writ because appellant had previously filed a post-conviction petition for a writ of habeas corpus and failed to raise his claims in his prior petition. [fn 4: *See* NRS 34.810(1)(b)(2), (2).] Appellant's petition was procedurally barred absent a demonstration of good cause and prejudice. [fn 5: *See* NRS 34.726(1); NRS 34.810(19)(b), (3).]

Exhibit 15. The court went on to consider and reject petitioner's arguments as to good cause. *Id.*

C. The Procedural Default Was an Independent and Adequate State Law Ground for the Nevada Supreme Court's Disposition of Petitioner's Claims.

"In order to constitute adequate and independent grounds sufficient to support a finding of procedural default, a state rule must be clear, consistently applied, and well-established at the time of the petitioner's purported default." *Wells v. Maass*, 28 F.3d 1005, 1010 (9th Cir. 1994).

The Ninth Circuit Court of Appeals has held application of the very procedural bar at issue in this case -- NRS 34.726(1)-- to be independent and adequate state grounds. *See Moran v. McDaniel*, 80 F.3d 1261, 1268-70 (9th Cir. 1996).

This Court finds that the Nevada Supreme Court's holding that petitioner's state-court

1 habeas petition was untimely under NRS 34.726(1) was an independent and adequate ground for the
2 court's dismissal of petitioner's state-court petition. Because dismissal for lack of timeliness has
3 been established to be adequate and independent grounds, the Court need not discuss NRS 34.810 in
4 that context. Suffice it to say that the Courts have determined that NRS34.810 is also an adequate
5 and independent state law ground for dismissal. *See Valerio v. Crawford*, 306 F.3d 742 (9th Cir.
6 2002).

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8 D. Petitioner Has Not Shown "Cause" With Respect to the
Procedural Default.

9 To demonstrate cause for a procedural default, the petitioner must be able to "show
10 that some objective factor external to the defense impeded" his efforts to comply with the state
11 procedural rule. *Murray v. Carrier*, 477 U.S. 478, 488 (1986). For cause to exist, the external
12 impediment must have prevented the petitioner from raising the claim. *See McCleskey v. Zant*, 499
13 U.S. 467, 497 (1991). Ineffective assistance of counsel may satisfy the cause requirement to
14 overcome a procedural default only if the independent claim of ineffective assistance of counsel,
15 itself, has been exhausted in state court. *Murray*, 477 U.S. at 488-89. Ineffective assistance of
16 counsel cannot serve as cause if the ineffective-assistance-of-counsel claim, itself, has been
17 procedurally defaulted. *Edwards v. Carpenter*, 529 U.S. 446, 451-53 (2000).

18 As cause to overcome the default, petitioner contends that the state court should not
19 have entertained the first post-conviction petition while the direct appeal was pending and should
20 have notified appellate counsel that there was a premature post-conviction petition pending at the
21 same time as the direct appeal. These failings on the part of the state court, petitioner argues,
22 prevented him bringing his claims forward for a review on their merits. This argument does not
23 present good cause to overcome the procedural default. Petitioner, himself, prepared and filed the
24 first post-conviction petition and he could have informed his appellate counsel of its existence.

25 Petitioner also argue that his inability to access the law library was an external
26 impediment which cause his petition to be untimely. As noted by respondents, this argument fails in

1 light of the fact that petitioner had already filed one post-conviction petition within the one-year
2 deadline. He offers no rational excuse for failing to include all of his known claims in that petition.

3 Finally, petitioner argues that the second petition was not successive because the
4 court had no jurisdiction to hear the matter when the direct appeal was still pending. This argument
5 was discounted by the Nevada Supreme Court in holding that the petition was “an independent
6 proceeding” and that the district court did not lack jurisdiction under *Sheriff v. Gleave*, 104 Nev.
7 496, 498 , 761 P.2d 416, 418 (1988) which held that habeas corpus is an independent proceeding and
8 *Bongiovi v. Bongiovi*, 94 Nev. 321, 579 P2d 1246 (1978) which held that the district court retains
9 jurisdiction over matters collateral to and independent from the part of the case taken on appeal.

10 Petitioner has not shown good cause for the procedural default in state court. As a
11 result, the petition may be dismissed on that ground.

12 IV. Exhaustion

13 Respondents argue that ground six of the petition is unexhausted because it was never
14 presented to the Nevada Supreme Court for review. Petitioner concedes the point and volunteers to
15 abandon any unexhausted claims. Thus, while petitioner originally presents a mixed petition
16 containing both exhausted and unexhausted claims, his willingness to abandon ground six moots this
17 argument as a basis for dismissal.

18 V. Timeliness

19 Under the Antiterrorism and Effective Death Penalty Act (AEDPA), in the context
20 presented here, a federal habeas petition must be filed within one year after “the date on which the
21 judgment [of conviction] became final by the conclusion of direct review or the expiration of the
22 time for seeking such review.” 28 U.S.C. § 2244(d)(1)(A). However, under § 2244(d)(2), “[t]he
23 time during which a properly filed application for State post-conviction or other collateral review
24 with respect to the pertinent judgment or claim is pending shall not be counted toward any period of
25 limitation under this subsection.” 28 U.S.C. § 2244(d)(2).

26 Respondents argue that petitioner’s one-year period expired on July 19, 2006, one

1 year and ninety days after remittitur issued on his direct appeal. Petitioner argue that the second state
2 petition, and the instant federal petition, was not untimely because he had a first federal petition
3 pending between June 14, 2006 and November 3, 2006. He notes that the first federal petition was
4 on file before the expiration of the one year deadline on July 19, 2006. Unfortunately, a federal
5 habeas petition does not toll the statute of limitations on a later filed petition. *See Duncan v.*
6 *Walker*, 533 U.S. 167, 121 S.Ct. 212, (2001). Moreover, under established law, a later petition does
7 not relate back to the commencement of a prior habeas action following a without prejudice
8 dismissal. *See, e.g., Rasberry v. Garcia*, 448 F.3d 1150, 1154-55 (9th Cir. 2006)(for purposes of
9 timeliness, a second petition did not relate back to a timely-filed first petition dismissed without
10 prejudice); *Green v. White*, 223 F.3d 1001, 1003 (9th Cir. 2000)(similar); *Henry v. Lungren*, 164
11 F.3d 1240, 1241 (9th Cir. 1999)(in determining custody, the dismissal of the first petition without
12 prejudice terminated the litigation, and the second petition did not relate back to the filing of the first
13 petition). Thus, any argument that the instant petition should relate back to the petition he filed in
14 2006 is also unpersuasive.

15 A. Equitable Tolling

16 The one-year limitation period may be equitably tolled “if extraordinary
17 circumstances beyond the prisoner’s control make it impossible to file a petition on time.” *Miranda*
18 *v. Castro*, 292 F.3d 1063, 1066 (9th Cir. 2002)(emphasis in original). The petitioner has the burden
19 of proof on this “extraordinary exclusion.” 292 F.3d at 1065. He accordingly must demonstrate a
20 causal relationship between the extraordinary circumstances and the lateness of his filing. *Spitsyn v.*
21 *Moore*, 345 F.3d 796, 799 (9th Cir. 2003). Equitable tolling is “unavailable in most cases” and the
22 threshold necessary to trigger equitable tolling is “very high, lest the exceptions swallow the rule.”
23 *Miranda*, 292 F.3d at 1066.

24 Petitioner argues that he is entitled to equitable tolling because he was denied direct
25 access to the law library until 2006 because he was a youth offender housed in a segregated unit
26 away from the general population. He further argues that the unit was served by a non-Spanish

1 speaking inmate law clerk who failed to instruct him how to request law books.

2 The arguments are unpersuasive and fail to present extraordinary circumstances.
3 Petitioner's admission that he had access to a law clerk belies any contentions that he was unable to
4 access legal resources. Furthermore, he fails to explain why he could not have presented all of his
5 post-conviction claims in the original petition he filed in 2004. Petitioner is not entitled to equitable
6 tolling.

7 VI. Conclusion

8 The motion to dismiss shall be granted. Petitioner's claims were procedurally
9 defaulted in state court and the instant petition was filed after the expiration of his one-year
10 limitations period imposed by 28 U.S.C. § 2244(d)(1). The issue of exhaustion of the claims is
11 rendered moot by these conclusion.

12 VII. Certificate of Appealability

13 Should petitioner wish to appeal this decision, he must receive a certificate of
14 appealability. 28 U.S.C. § 2253(c)(1); Fed. R. App. P. 22; 9th Cir. R. 22-1; *Allen v. Ornoski*, 435
15 F.3d 946, 950-951 (9th Cir. 2006); *see also United States v. Mikels*, 236 F.3d 550, 551-52 (9th Cir.
16 2001). Generally, a petitioner must make "a substantial showing of the denial of a constitutional
17 right" to warrant a certificate of appealability. *Id.*; 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529
18 U.S. 473, 483-84 (2000). "The petitioner must demonstrate that reasonable jurists would find the
19 district court's assessment of the constitutional claims debatable or wrong." *Id.* (*quoting Slack*, 529
20 U.S. at 484). In order to meet this threshold inquiry, the petitioner has the burden of demonstrating
21 that the issues are debatable among jurists of reason; that a court could resolve the issues differently;
22 or that the questions are adequate to deserve encouragement to proceed further. *Id.*

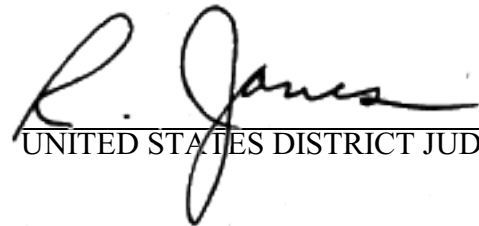
23 Pursuant to the December 1, 2009 amendment to Rule 11 of the Rules Governing
24 Section 2254 and 2255 Cases, district courts are required to rule on the certificate of appealability in
25 the order disposing of a proceeding adversely to the petitioner or movant, rather than waiting for a
26 notice of appeal and request for certificate of appealability to be filed. Rule 11(a). This Court has

1 considered the issues raised by petitioner, with respect to whether they satisfy the standard for
2 issuance of a certificate of appealability, and determines that none meet that standard. The Court
3 will therefore deny petitioner a certificate of appealability.

4 **IT IS THEREFORE ORDERED** that respondents' Motion to Dismiss (ECF No.
5 12) is **GRANTED**. The petition is **DISMISSED WITH PREJUDICE**. No Certificate of
6 Appealability shall issue.

7 **IT IS FURTHER ORDERED** that the Clerk shall **ENTER JUDGMENT**
8 **ACCORDINGLY**.

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10 Dated this 25th day of April, 2011.

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14 UNITED STATES DISTRICT JUDGE
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